Board of Alien Labor Certification Appeals
United States Department of Labor
Washington, D.C.

DATE: December 12, 1997
CASE NO: 96-INA-367

In the Matter of:

NEW YORK BRAZIL DANCERS INC.
Employer

On Behalf of:

ANTONIO F. REIS
Alien

Appearance: Joel Z. Robinson, Esq.
New York, NY
For the Employer and Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the employer's request for review pursuant to 20 C.F.R. 656.26 (1991) of the denial by the United States Department of Labor Certifying Officer ("CO") of alien labor certification. This application was submitted by employer on behalf of the above-named alien pursuant to §212 (a) (5) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182 (a) (5) ("Act"). The certification of aliens for permanent employment is governed by § 212 (a) (5) (A) of the Act, 8 U.S.C. §1182 (a) (5) (A), and Title 20, Part 656 of the Code of Federal Regulations ("CFR"). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212 (a) (5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United

States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

We base our decision on the record upon which the CO denied certification and the employer's request for review, as contained in the Appeal File,[1] and any written argument of the parties. § 656.27(c).

Statement of the Case

On January 20, 1995, New York Brazil Dancers, Inc. ("employer") filed an application for labor certification to enable Antonio F. Reis ("alien") to fill the position of Dancer at a weekly wage of $704.00 (AF 347). The job duties for the position are described as follows:

> Dances alone, with partner, or in group to entertain and educate audiences; performs classical, modern, Contemporary Dance, and Jazz coordinating body movements to musical accompaniment; through class instruction, work shops, and supervised training instructs pupils in ballet, ballroom, Brazilian, African Brazilian, African, Martha Graham Contemporary Dance, jazz, and other forms of dancing; observes students to determine physical and artistic qualifications and limitations and plans programs to meet students [sic] needs and aspirations; explains and demonstrates techniques and methods of regulating movements of body to music or rhythmatic accompaniment; drills pupils in execution of dance steps; teaches theory and practice of dance notation; choreographs and directs dance performance (AF 347).

The employer required a high school degree plus one year of training in Classical Ballet, one year of training or experience in Martha Graham-type dance, and two years of training or experience in Brazilian or African Brazilian Dance.

On January 22, 1996, the CO issued a Notice of Findings proposing to deny the labor certification. The CO found that the petitioner failed to establish that it was an employer under § 656.3 which defines employer as "a person, association, firm or corporation which currently has a location within the United States to which U.S. workers may be referred for employment." The CO found that the petitioner failed to show that it was an employer because it did not have a separate business address, but instead used the address of an apartment of one of its founders. The CO also noted that the petitioner did not demonstrate that it had business revenues, full-time employees, or sufficient funding to pay for operating expenses. The CO instructed the petitioner to submit several items including a copy of the lease or deed of property where the business is conducted, payroll records, an unemployment number, telephone bills, and advertising brochures. The CO also instructed the petitioner to establish that the position meets the definition of "employment" under § 656.3 of the regulations. Under § 656.3, the employer must demonstrate

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[1] All further references to documents contained in the Appeal File will be noted as "A*f n*," where *n* represents the page number.

that the offered position constitutes permanent, full-time work by an employee for an employer other than oneself.

In rebuttal, dated February 26, 1996, the petitioner argued that it is not a speculative operation, but exists as a not-for-profit business entity. The petitioner submitted a copy of its certificate of incorporation dated June 23, 1994, as well as a 1994 federal income tax return. The income tax return, however, shows no income because the petitioner began conducting business after the period covered by the tax return. The petitioner was unable to provide an unemployment number because it retained dancers and musicians as independent contractors up until the time of the certification application. It explained that it is in the process of attaining an unemployment number. Finally, the petitioner asserted that it licensed the use of office space from a company owned by one of the petitioner's directors, Mr. Christopher Brickhill. It provided a business address and telephone number, but failed to include phone bills because it had only recently obtained a business listing.

The CO issued the Final Determination on March 13, 1996 denying the labor certification. The CO found the employer's rebuttal evidence to be insufficient noting that the evidence included "an agreement from IDS Storm, dated 1-1-96, that states that employer is permitted to sublease space on IDS premises; a letter of 10-3-95 from Internal Revenue, giving a temporary ruling that employer will be treated as a publicly supported organization; a copy of income tax for 1994, showing no income" (AF 337). The CO also observed that the employer did not document a regular source of income, but stated that initial funding derived from Mr. Brickhill. The CO added that independent contractors are not employees under the regulations. Based on these findings, the CO concluded that the petitioner failed to document that it is an employer which offered a permanent and full-time position under the regulations (AF 338).

On April 11, 1996, the employer requested administrative review of Denial of Labor Certification pursuant to § 656.26 (b) (1) (AF 352).

Discussion

The issues presented by this case are whether the petitioner documented that it is an employer, and whether the offered position constitutes a full-time position under § 656.3 of the federal regulations.

Section 656.3 defines "employer" as a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker. Concordantly, §656.3 defines "employment" as permanent, full-time work by an employee for an employer other than oneself. 20 C.F.R. §656.3. The employer bears the burden of proving both the existence of an employer and that the position is permanent and full-time. If the employer fails to meet this burden, certification may be denied. *Gerata Systems America, Inc.*, 88-INA-344 (Dec. 16, 1988).

In this case, the petitioner submitted several items in an attempt to demonstrate that it meets the requirements under § 656.3. Among these items are a copy of a licensing agreement which permits the petitioner to share office space with IDS Storm, a company operated by Mr. Brickhill who is also one of the petitioner's principals. The agreement allows the petitioner to "have access and use of the common area and an available office or desk at the Premises" (AF 308). The petitioner provided its recently acquired business address and phone number as well as a 1994 income tax return which shows no income. The petitioner reported that it is in the process of obtaining an unemployment number, and that it does not have any shareholders or officers, but is managed by Mr. Brickhill and two other directors. The petitioner admitted that there is no consistent source of funding for the business, but stated that funding came from the financial backing of Mr. Brickhill as well as private donations. Based on this information, the CO concluded that the petitioner failed to prove that it is an employer and that it offered a permanent, full-time position.

We agree with the CO and find the petitioner's evidence to be unpersuasive. First, it is unclear whether the petitioner is a viable business entity as it has no regular source of funding. The lessor on the licensing agreement permitting the use of office space is Mr. Brickhill, a principal of both the petitioner and IDS Storm. Moreover, the income tax return has little probative value as it lists no business income for 1994 (AF 295). The petitioner failed to respond to the CO's request that it submit payroll records, instead providing employment contracts which testify to the employment of several dancers as independent contractors. The CO correctly concluded that independent contractors are not employees under the principles of contract law. In view of this evidence, we cannot grant certification as the petitioner is not an employer offering full-time, permanent employment under the § 656.3.

It is well-settled that an employer, seeking the benefit of a special provision of the Immigration and Nationality Act under which a foreign worker is to be certified to take a job within the United States, has the burden of proof. *Cathay Carpet Mills, Inc.*, 87-INA-161 (Dec. 7, 1988) (*en banc*). Based on the record before us, the employer failed to carry that burden.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

JOHN C. HOLMES
Administrative Law Judge

NOTICE FOR PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office Of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced type-written pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced type-written pages. Upon the granting of a petition, the Board may order briefs.